Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term 1994

L. VIRGINIA VENTRE,

Petitioner,

v.

ROGER W. JOHNSON,

Respondent.

PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF *CERTIORARI*

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QUESTIONS PRESENTED

1. Does a United States Court of Appeals have jurisdiction upon appeal from final judgment to consider the validity of a venue transfer order pursuant to 28 U.S.C. § 1404(a) made by transferor district court not within the transferee circuit?

2. Do the 1991 Civil Rights Act provisions permitting a jury trial and compensatory damages in suits against the United States Government apply to a case filed after the effective date of the Act relating to conduct that occurred prior to the effective date?

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Petitioner L. Virginia Ventre respectfully prays that the Supreme Court grant a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit decided on October 28, 1994. App. A. Petitioner's petition for rehearing and suggestion for rehearing in banc was denied on November 25, 1994. The judgment took effect on December 2, 1994. App. B.

PARTIES TO THE PROCEEDING

All parties to the proceeding in the Fourth Circuit Court of Appeals appear in the caption. The respondent is the Administrator of the United States General Services Administration.

GROUNDS FOR JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit is an unpublished opinion denying the relief requested by the petitioner on October 28, 1994. App. A. Petitioner filed a petition for a rehearing with a suggestion for a rehearing in banc on November 14, 1994. The petition was denied on November 25, 1994 and the judgment was entered on December 2, 1994. App. B. The United States District Court for the Eastern District of Virginia entered a final judgment on October 6, 1993 denying the relief sought by the plaintiff.

Jurisdiction of the United States Supreme Court is granted by 28 U.S.C. § 1254(1) and 2101(c).

STATUTES INVOLVED IN THE CASE

This case involves 28 U.S.C. § 1404(a)[1] providing authority for transfers of venue in the District Court, and the Civil Rights Act of 1991, P.L. 102-166, Rev. Stat. § 1977A(a), 42 U.S.C. § 1981a, 105 Stat. 1071-1100 (1991) (hereinafter referred to as the "1991 Act"). The specific provision at issue in this case is section 102 of the 1991 Act.[2]

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[1]28 U.S.C. § 1404(a) reads:

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

[2]The full text of section 102, paragraph (a)(1) (42 U.S.C. 1981a(a)(1), 105 STAT. 1072) is as follows:

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent."

STATEMENT OF THE CASE

The basis for federal District Court jurisdiction in first instance is 42 U.S.C. § 2000e-5(f)(3), which is made applicable to suits against the United States Government by 42 U.S.C. § 2000e-16(c). These provisions, *inter alia*, prohibit discrimination on the basis of sex in employment by the Federal Government. Appellate jurisdiction in the Fourth Circuit Court of Appeals was conferred by 28 U.S.C. § 636(c)(3), 42 U.S.C. § 2000e-5(j), and 42 U.S.C. § 2000e-16(d).

In 1986, Virginia Ventre was selected and subsequently participated in a career training program within the General Services Administration (GSA). As a participant in this program, she was expecting on February 14, 1988 the final non-competitive promotion to the advertised "promotion potential" of the job for which she had trained.

However, in January of 1988 a new supervisor was assigned over her position to replace her supervisor who retired the month before. The new supervisor checked Virginia Ventre's performance with others in the division and awarded her in March 1988 a certificate of achievement for her performance during the preceding year. However, the new supervisor declined to promote Virginia Ventre on her February 14, 1988 anniversary date, giving as a reason the "office policy" requiring another year of experience in the division in which Virginia Ventre worked.

The following year, when Virginia Ventre met the requirement of an additional year of experience, the new supervisor again declined to promote Virginia Ventre, giving reasons relating to poor performance and knowledge of her job, despite successful or highly successful performance ratings during her formal evaluations in the course of the year.

Virginia Ventre, perceiving a pattern of discrimination against women in the division who had also worked for her supervisor, filed an administrative complaint of sex discrimination against her supervisor, William W. Albee, on June 19, 1989.

Virginia Ventre alleged in her administrative complaint that her supervisor discriminated against her on the basis of sex in refusing to promote her, despite successful performance on the job. Virginia Ventre was eligible to be promoted on a non-competitive basis to the GS-12 level on February 14, 1988.

The GSA reached a final agency decision on July 5, 1991, denying any discrimination on the part of GSA. Virginia Ventre filed a timely appeal with the Equal Employment Opportunity Commission, which, on the basis of the written record, affirmed the agency decision on December 30, 1991.

Virginia Ventre instituted the underlying action on March 23, 1992 in the United States District Court for the District of Columbia. The action was filed within the 90-day time period permitted under the 1991 Act which became effective the prior November 21, 1991. The action was untimely if the shorter unamended time period of the Civil Rights Act of 1964 applied. Virginia Ventre asked for compensatory damages and a jury trial in the complaint. The defendant, the Administrator of the General Services Administration, filed a motion seeking to withdraw its earlier motion to dismiss on the basis of untimeliness, and have the remainder of the motion considered a motion for partial dismissal as to L. Virginia Ventre's request for compensatory damages and to strike the jury demand. The Court granted defendant's amended motion in its entirety without explaining why the extended filing period applied but not the jury trial or compensatory damages provision. The district court's order was dated February 25, 1993.

While defendant's motion to dismiss was pending, the defendant, on August 19, 1992, filed a motion to transfer the case pursuant to 28 U.S.C. § 1404(a) alleging that the parties reside in and the facts arose in the Eastern District of Virginia. Virginia Ventre opposed the motion to transfer, supplying affidavits to show that the conveniences of the parties and witnesses and the interest of justice militated against the transfer. The district court granted the defendant's motion to transfer with a memorandum and order dated April 19, 1993.

The case was tried in the United States District Court for the Eastern District of Virginia, Alexandria Division, before a magistrate judge on October 6, 1993, who found for the defendant on the merits on all claims.

Virginia Ventre appealed the decision of the District Court to the Fourth Circuit Court of Appeals raising two issues:

> That the transfer of venue from the District of Columbia to the Eastern District of Virginia, Alexandria Division, pursuant to § 1404(a) was an abuse of discretion; and,
>
> That the decision to strike the demand for compensatory damages and a jury trial was in error.

On October 28, 1994, the Fourth Circuit ruled that it lacked appellate jurisdiction to decide after final judgment whether or not there was an abuse of discretion on the change of venue decision. The Fourth Circuit, citing three Fourth Circuit precedents, the first dating from 1964, reaffirmed its precedents that it lacks jurisdiction to review a transfer order entered by a district court in another circuit. App. A. The Fourth Circuit judgment also affirmed the judgment of the district court to strike the compensatory damages and jury trial demand, interpreting *Landgraf v. USI Film Products*, 114 S.Ct. 1483, 1508 (1994) as making the 1991 Act inapplicable "to cases arising before its enactment." App. A

On November 14, 1994, Virginia Ventre filed a timely petition for rehearing with suggestion for rehearing in banc. On the transfer issue, Ms. Ventre argued that the Fourth Circuit rule precluding review of a transfer decision on final judgment promotes policies inconsistent with the intent of Congress to limit appeals to final judgments, is inconsistently applied only to venue decisions and not other decisions by the transferor court, unnecessarily challenges traditional precepts of comity between district courts, and is inconsistent with the interpretation of the law in other Circuits and with the scope of the jurisdictional statute interpreted by the Supreme Court. On the 1991 Act, Ms. Ventre argued, *inter alia*, that the Fourth Circuit misinterpreted the directions of the Supreme Court in

Landgraf because the case did not arise until it was filed after the enactment and effective date of the 1991 Act.

The Fourth Circuit denied the petition for rehearing and suggestion for rehearing in banc on November 25, 1994. The judgment took effect on December 2, 1994. App. B.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT *CERTIORARI* TO RESOLVE THE SPLIT IN THE CIRCUITS AS TO WHETHER APPELLATE JURISDICTION ON FINAL APPEAL INCLUDES AUTHORITY TO REVIEW VENUE TRANSFER DECISIONS MADE IN A TRANSFEROR DISTRICT COURT RESIDING IN ANOTHER CIRCUIT.

The Second[3], Third[4], Fifth[5] and Ninth[6] Circuits have ruled contrary to the Fourth Circuit. The Fourth[7], Seventh[8] Eleventh[9]

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[3] *Magnetic Engineering & Mfg. Co. v. Dings Mfg. Co.*, 178 F.2d 866 (2nd Cir. 1950).

[4] *Nascone v. Spudnuts, Inc.*, 735 F.2d 763 (3rd Cir. 1984); *Gulf Research & Development Co. v. Leahy*, 193 F.2d 302 (3rd Cir. 1951).

[5] *U.S. v. Koenig*, 290 F.2d 166 (5th Cir. 1961), aff'd. 82 S.Ct. 654, 369 U.S. 121, 7 L.Ed.2d 614 (1962)

[6] *American Fidelity Fire Insurance Co. v. U.S. District Court*, 538 F.2d 1371 (9th Cir. 1976); *Gulf Research & Development Co. V. Harrison*, 185 F.2d 457 (9th Cir. 1950).

[7] *Preston Corp. v. Raese*, 335 F.2d 827 (4th Cir. 1964); *Linnell v. Sloan*, 636 F.2d 65 (4th Cir. 1980); *Brock v. Entre Computer Centers, Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991).

[8] *Illinois Tool Works v. Sweetheart Plastics*, 436 F.2d 1180 (7th Cir.), cert. dismissed, 403 U.S. 942, 91 S.Ct. 2270, 29 L.Ed.2d 722 (1971); *Purex Corp. v. St. Louis Nat'l Stockyards*, 374 F.2d 999 (7th Cir.) cert. denied, 389 U.S. 824, 88 S.Ct. 59, 19 L.Ed.2d 77 (1967).

[9] *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns*, 689 F.2d 982 (11th Cir. 1984).

and District of Columbia[10] Circuits are in accord. The Eighth Circuit's precedent provides support for both views.[11]

The Supreme Court, in a § 1404 venue transfer case involving a challenge to the jurisdiction of the transferee district court, observed that there was a right to appeal in transferee Seventh Circuit upon final judgment to consider the venue transfer decision:

> "The question of that court's [the transferee district's] jurisdiction still remained subject to attack as of right on appeal to the 7th Circuit from any final judgment in the action."

Hoffman v. Blaski, 363 U.S. 335, 340 n.9, 80 S.Ct. 1084, 4 L.Ed.2d 1254, 1260 (1960). While Ms. Ventre does not challenge the jurisdiction of the transferee district court, but argues that the transfer was an abuse of discretion, the principle is the same. There is a right to appeal upon final judgement in the action.

The Third Circuit, in *Nascone v. Spudnuts, Inc.,* 735 F.2d 763 at 772 (3rd Cir. 1984), ruled that the Supreme Court in *Hoffman v. Blaski* held that "wrongly decided transfer motions could be asserted as grounds for error on appeal from final judgment." The *Nascone* court further clarifies,

> "But the law of the case may preclude coordinate district courts from overruling each other, it would not have prevented the transferee circuit (the Third Circuit) from in effect overruling on appeal from final judgment

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[10]*Starnes v. McGuire*, 512 F.2d 918 (DC Cir. 1974).

[11]*Technitrol, Inc. McManus*, 405 F.2d 84 (8th Cir. 1968), cert. denied, 394 U.S. 997, 89 S.Ct. 1591, 22 L.Ed.2d 775, the Eighth Circuit declined the remedy of mandamus to force the Georgia district court to retransfer venue to Iowa because it is not for the transferee district court to sit as an appellate court over the transferror circuit. *Id.* at 89. Rather, "The ruling on the transfer order, as is the situation with interlocutory orders generally, remains open for consideration upon appeal from final judgment." *Id.* at 88 (citations omitted). However, in dicta, the Eighth Circuit said "While we have grave doubt whether we have any right to review the validity of a transfer order made by a Federal District Court outside the circuit, we deem it unnecessary to resolve such a question here." *Id.* at 87.

> (or conceivably mandamus) the determination of the transferor district court as to the determination of venue."

Id. at n. 9

The Ninth Circuit ruled in *Am. Fid. Fire Ins. v. U.S. Dist. Ct. for N.D. CAL.*, 538 F.2d 1371 at 1376-77 (9th Cir. 1976)—

> "a venue transfer between district courts in different circuits pursuant to 28 U.S.C. §§ 1404(a) or 1406(a) can be reviewed as a matter of right in a court of appeals. . . . [Footnote 4 explains] On appeal from a final judgment we may exercise our appellate jurisdiction to review a district court's transfer order, even if the transferor court is not within our circuit." (citations omitted).

The Court should grant *certiorari* to resolve this conflict among the circuits.

II. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FOURTH CIRCUIT RULE DISCLAIMING APPELLATE JURISDICTION CONTRAVENES THE INTENT OF CONGRESS TO DISCOURAGE INTERLOCUTORY APPEALS AND TO PROMOTE APPEALS FROM FINAL JUDGMENTS.

The Fourth Circuit rule prohibiting appellate review of § 1404(a) venue transfers in the transferee Circuit erects a barrier to the regular appeal process intended by Congress pursuant to 28 U.S.C. § 1291. The Fourth Circuit recognized the intent of § 1291 in *Jiffy Lubricator Company, Inc. v. Stwewart-Warner Corp.*, 177 F.2d 360, 361 (4th Cir. 1949) *cert. denied.*, 338 U.S. 947, 70 S.Ct. 484, 94 L.Ed. 584 (4th Cir. 1950) that appeals from interlocutory orders, such as change of venue under § 1404, are not permitted under 28 U.S.C. § 1291. Yet, the Fourth Circuit's ruling in question is based upon the presumption that the interlocutory decision on venue transfer is one for consideration by the transferor Circuit not the transferee Fourth Circuit. In *Preston Corp. v. Raese*, 335 F.2d 827, 828

(4th Cir. 1964), the Fourth Circuit was asked to reverse an order transferring a case from the United States District Court for the Southern District of Florida to the United States District Court for the Northern District of West Virginia. The Fourth Circuit declined, stating,

> "The rule is well established that a transfer order is not appealable. Jiffy Lubricator Co. v. Stewart-Warner Corp., 177 F.2d 360 (4th Cir. 1949), cert.denied, 338 U.S. 947, 70 S.Ct. 484, 94 .Ed. 584 (1950). But even if such an order were appealable the appropriate appellate court would be the Fifth, not the Fourth Circuit. The attempt here is to appeal to us from an order entered by a District Court not within our territorial jurisdiction. We know of no authority permitting us to entertain such an appeal."

Id.

However, the cited authority relied upon by the *Preston* cout, *to wit,* the *Jiffy Lubricator* decision, did not involve an appeal after final judgment, but rather involved an interlocutory appeal from the decision to transfer in the transferee circuit. It does not provide the "well established" rule referred to in *Preston.* To the contrary, the *Jiffy Lubricator* court aludes to the principal that the judgment must be final to appeal. The court said,

> "Counsel for plaintiff rely upon decisions permitting appeals from dismissals in application of the principle for forum non conveniens; but these decisions are not in point. A dismissal in application of that or any other principle *puts an end to the action and hence is final and appealable*. An order transferring it to another district does not end but preserves it as against the running of the statute of limitations and for all other purposes."

Jiffy Lubricator at 362 (italics added).

The *Linnell v. Sloan,* 636 F.2d 65, 67 (4th Cir. 1980) case cited in the decision of the case at bar (App. A) involved a

transfer from the District of Columbia to the Eastern District of Virginia. The Fourth Circuit further explained:

> "We lack jurisdiction to decide this point. *Preston Corp. v. Raese,* 335 F.2d 827 (4 Cir. 1964). . . . [Plaintiff's] should have moved for retransfer of their action in the Eastern District of Virginia, the transferee district court, in order to vest us with jurisdiction to pass on their contention. *Purex Corp. v. St. Louis National Stockyards Co., 374 F.2d 998, 1000 (7 Cir. 1967); see* 15 C. Wright, A. Miller, E. Cooper, Federal Practice and Procedure § 3846 at 230 (1976)."

Id.

The Fourth Circuit's rule encourages two courses of action for a complaining party:

> (1) to seek mandamus or certified interlocutory appeal in the transferor district court's circuit. Since the District of Columbia Circuit has a rule that transfer orders will be reviewed by mandamus in extraordinary circumstances (*In re Sosa,* 712 F.2d 1479, 1480 (D.C. Cir. 1983)), the Fourth Circuit rule offers Ms. Ventre the option to seek review through certified interlocutory appeal at the time of the transfer decision; or
>
> (2) to ask for retransfer once the case has been transferred. The act of asking the transferee district court to retransfer confers jurisdiction on the transferee appellate circuit.

The first course of action contravenes the policy of 28 U.S.C. § 1291, which requires appeals from final judgments and not interlocutory decisions. This course of action also contravenes the express ruling of the Fourth Circuit in *Jiffy Lubricator*, in which the Fourth Circuit said,

> "We think it equally clear that the order is not appealable under 28 U.S.C.A. § 1292(1) as one granting an interlocutory injunction."

Jiffy Lubricator at 362.

This Court should settle the issue. As discussed below, whatever validity of the second course of action may have had,

current jurisprudential policies and procedures augur in favor of a less constrained reading of appellate jurisdiction. The Court should grant *certiorari* to settle the correct interpretation of the federal law and the policies promoted thereby.

The second course of action promoted by the Fourth Circuit's ruling is discussed in section III below.

III. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FOURTH CIRCUIT'S RULE LIMITING APPELLATE JURISDICTION STRAINS TRADITIONAL RULES OF COMITY BETWEEN DISTRICT COURTS AND IS WASTEFUL OF JUDICIAL RESOURCES.

The Fourth Circuit's rule requiring a motion to retransfer the venue back to the transferor district court in order to invest appellate jurisdiction in the Fourth Circuit dictates that its district courts of equal rank to transferor district courts in other circuits, would be sitting as appellate courts over coordinate-level district courts. The wastefulness of this rule is evidenced that as a practical matter, it is highly unlikely that a district court will retransfer the case back to the transferring district. *See* 1B J. Moore, Federal Practice ¶ 0.404 [8].

The Fifth Circuit holds in *United States v. Koenig,* 290 F.2d 166, 173 n. 11 (5th Cir. 1961) *aff'd.* 1962, 82 S.Ct. 654, 369 U.S. 121, 7 L.Ed. 2d 614:

> "Similarly, the action of the court on a motion to transfer under 28 U.S.C.A. § 1404(a) constitutes the law of the case. 1 Moore, Federal Practice ¶0.404 [8]. If the motion to transfer is granted and the case transferred to another district, the transferee-district should accept the ruling on the transfer as the law of the case and should not re-transfer 'except under the most impelling and unusual circumstances' or if the transfer order is 'manifestly erroneous'. Ibid. The law of the case is a guide to the

discretion of the court, a rule of practice, not a limitation on the court's power."

The Sixth Circuit, in a case that had been shuttled between disitrict courts for eight years, observed—

"The legislative history of § 1404(a), found in Reviser's Notes, states that the section was 'drafted in accordance with the doctrine of forum non conveniens.' It was never intended to afford a vehicle in patent litigation to shuttle cases involving the same patents between different District Courts in different Circuits, resulting in a battle over the choice of forum, and delaying indefinitely a trial on the merits. . . ."

Skil Corp. v. Millers Falls Co., 541 F.2d 554, 559 (6th Cir. 1976), cert. den. (1976) 429 U.S. 1029, 97 S.Ct. 653, 50 L.Ed. 631.

If the Fourth Circuit rule were other than ritual, it would encourage a situation wherein the parties could become enmeshed in a shuttle process between dueling district courts, straining the traditional rules of comity between district courts.

The rule in the Third Circuit is stated in *Hayman Cash Register Company v. Sarokin*, 669 F.2d 162, 168-69 and n.6. (3rd Cir. 1982):

"that traditional law of the case principles should govern the propriety of a transfer order . . . 'judges of co-ordinate jurisdiction sitting in the same court and in the same case should not overrule decisions of each other' [citations omitted]. . . .

"The purpose of this rule is 'to preserve the orderly functioning of the judicial process' [citation omitted]. . . . the transfer order 'establishes the law of the case for the transferee-district court, which it should normally adhere to in the interest of allowing the litigation to proceed and not become enmeshed in a shuttle process.' 1B J. Moore, Federal Practice ¶ 0.404 [8], at 534-35 (2d ed. 1980) (footnotes omitted [sic]) . . . .

"Adherence to law of the case principles is even more important in this context where the transferor judge and

> the transferee judge are not members of the same court. Here, the principles of comity among courts of the same level of the federal system provide a further reason why the transferee court should not independently re-examine an issue already decided by a court of equal authority. [citations omitted]"[sic].

This Court should grant *certiorari* as an exercise of its power of supervision over the lower courts to encourage consistency between district courts of the several circuits and comity between the federal jurisdictions.

IV. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FOURTH CIRCUIT RULE DEPARTS FROM THE USUAL COURSE OF JUDICIAL POCEEDINGS AND PROMOTES INCONSISTENT TREATMENT OF DECISIONS OF THE TRANSFEROR CIRCUIT.

The Fourth Circuit's limitation on jurisdictional authority distinguishes a decision of the transferor court on venue matters from all other decisions made by the transferor court. For example, the transferor district court's decision to strike Ms. Ventre's jury demand and claim for compensatory damages was appealable by Ms. Ventre. Yet, there seems to be little difference in this district court decision and the venue transfer decision. This inconsistency departs from the accepted and usual course of judicial proceedings. The decisions of the transferor court are the law of the case. They are merged in the judgment and should all be appealable upon final judgment. Professor Moore explains—

> "If the case is transferred, such orders as have been made prior to transfer are a part of the record and continue in effect, and the case proceeds in the transferee court from that point. While in general a district court does not owe obedience to the decisions of co-ordinate courts of the same rank, interlocutory decisions made

prior to transfer are the law of the case and as a matter of practice should not be routinely reexamined." (Footnotes omitted). 1B J. Moore, Federal Practice, ¶ 0.404 [8] page 156, 157.

The alternative for consistency sake is to hold that all transferor district court decisions are not reviewable. This view would do irreconcilable violence to the acknowledged intent of 28 U.S.C. § 1291 precluding interlocutory appeals and favoring appeals from the final judgment. The better jurisprudential rule is to hold that all decisions in the case become the law of the case and are merged in the judgment. This latter rule would be entirely consistent with statutory intent.

This Court should grant *certiorari* to resolve the departure from the accepted and usual course of judicial proceedings and to supervise the inferior courts on matters of consistency and fairness in procedure.

CONCLUSION AS TO REASONS FOR GRANTING *CERTIORARI* ON THE QUESTION OF APPELLATE JURISDICTION ON VENUE TRANSFERS

There are conflicting rulings among the Federal Circuit Courts of Appeal on the scope of their appellate authority. The Fourth Circuit ruling on its jurisdiction challenges accepted statutory policies limiting interlocutory appeals, results in unfairness to litigants, and strains comity between federal courts.

It is respectfully submitted that this issue has been sufficiently vetted by the lower courts and now the issue is ripe for review in this Court. Without this Court's guidance and supervision, the lower courts cannot preserve the orderly functioning of the judicial process or come to a consistent resolution of this issue. Without this Court's intervention the Circuits will remain in conflict.

V. THIS COURT SHOULD GRANT *CERTIORARI* BECAUSE THE FOURTH CIRCUIT MISINTERPRETED THIS COURT'S DECISION IN *LANDGRAF*.

The Fourth Circuit's opinion purports to follow *Landgraf v. USI Film Products*, 114 S.Ct. 1483 in holding that § 102 of the Civil Rights Act of 1991 "does not apply 'to cases arising before its enactment.'" App. A. However, *Landgraf* involved a *pending case*. The case at bar was not a pending case but was filed almost four months after the effective date of the 1991 Act. The Fourth Circuit misinterpreted *Landgraf*. Under the plain meaning of the statute, this case arose when the action was filed, which was after the enactment of the 1991 Act.

The Civil Rights Act of 1991 states in section 102 at paragraph (a)(1)—

> "In an *action* brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-5) . . . the complaining party may recover compensatory . . . damages."

(italics added.)[12]

The word "action" in the context of the law is explained in under section 706 of the Civil Rights Act of 1964, (42 U.S.C. § 2000e-5(f)(3)), "Each United States district court . . . shall have jurisdiction of *actions* brought under this subchapter."

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[12]The full text of section 102, paragraph (a)(1) (42 U.S.C. 1981a(a)(1), 105 STAT. 1072) is as follows:

"(a) RIGHT OF RECOVERY.—

"(1) CIVIL RIGHTS.—In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-5) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. 2000e-2 or 2000e-3), and provided that the complaining party cannot recover under section 1977 of the Revised Statutes (42 U.S.C. 1981), the complaining party may recover compensatory and punitive damages as allowed in subsection (b), in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent."

This Court held in *Landgraf* that—

"When a case implicates a federal statute enacted after the events in suit, the court's first task is to determine whether Congress has expressly prescribed the statute's proper reach. If Congress has done so, of course, **there is no need to resort to judicial default rules.**" (Bolding added) *Landgraf* at 4265.

Therefore, the plain language of the statute states that when an "action" is brought in the district court, the complaining party may recover compensatory damages. Where the Congress has waived the government's sovereign immunity, that waiver must be strictly construed. E.g., *Ardestani v. Immigration & Naturalization Serv.*, 112 S.Ct. 515, 520 (1991); *Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986); *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685-86 (1983).

This Court has recognized that the critical time for analysis of applicability of the Civil Rights Act of 1991 is "the statute as it existed at the time of this lawsuit." *United States v. Burke*, 504 U.S. ___, 112 S.Ct. 1867, 119 L.Ed 2d 34, 47 n. 12 (1992). This Court made no mention of the time of the conduct complained of when the Court declined to use the changes wrought by the Civil Rights Act of 1991 to transform an award of damages under Title VII to "tort-like" tax deductible claims. The only condition was "the time of this lawsuit." *Id.*

Section 402(a) of the Civil Rights Act of 1991[13] makes section 102 of the Act effective "upon enactment," which was November 21, 1991. Therefore, since petitioner brought her *action* four months after the effective date of the 1991 Act, she

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[13]The full text of section 402 (42 U.S.C. 1981, note, 105 STAT. 1099) is as follows:

"SEC. 402. EFFECTIVE DATE.

"(a) IN GENERAL.—Except as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment.

"(b) CERTAIN DISPARATE IMPACT CASES.—Notwithstanding any other provision of this Act, nothing in this Act shall apply to any disparate impact case for which a complaint was filed before March 1, 1975, and for which an initial decision was rendered after October 30, 1983."

was entitled to seek compensatory damages under the plain meaning of the 1991 Act. The time of the conduct complained of in the "action" is not a factor under the plain meaning of the statute. The strict construction of the statute makes it applicable to *actions* filed after its effective date.

In *Landgraf*, this Court clarified that -- "To the contrary, we understand the instruction that the provisions are to 'take effect upon enactment' to mean that courts should evaluate each provision of the Act in light of ordinary judicial principles concerning the application of new rules to **pending cases and pre-enactment conduct**." *Landgraf*, 114 S.Ct. at 1505, 62 LW at 4266. (Emphasis added).

While the case now before this Court involves pre-enactment conduct it does not involve a case pending upon enactment.

This Court's statement in *Landgraf* that "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment . . . or upsets expectations based in prior law." *Landgraf*, 114 S.Ct. at 1499, 62 LW at 4262. (Footnote omitted). This Court said, "Even absent specific legislative authorization, application of new statutes passed after the events in suit is unquestionably proper in many situations." *Landgraf*, 114 S.Ct. 1501, 62 LW at 4264.

In addition, the underlying reasoning of this Court in the *Landgraf* decision supports petitioner's right to a jury trial and compensatory damages. The fact that the respondent/defendant is the United States Government is a critical difference which removes the cause of this Court's denial of applicability of the 1991 Act in the *Landgraf* case and requires a different result in the instant case.

A linchpin of the this Court's *Landgraf* decision is the fact that the defendant was a private individual. The application of general principles on retroactivity in the *Landgraf* decision begins at page 4261 and extends to the end of the decision on

page 4267. The decision rests on the unfairness to private individuals to apply new damages to past conduct.[14]

The defendant/appellee in the instant case is the government of the United States and not a private individual. This distinction was important in *Landgraf*. This Court said—

> "Compensatory damages may be *intended* less to sanction wrongdoers than to make victims whole, but they do so by a mechanism that affects the liabilities of defendants. *They do not 'compensate' by distributing funds from the public coffers,* but by requiring particular employers to pay for harms they caused." (Italics supplied). *Landgraf* at 4266.

The same damages provisions referred to by the Supreme Court are intended to "compensate" by distributing funds from the public coffers when, as in the instant case, the defendant is the very same government that enacted the new rule. It may be unfair to apply the new compensatory damages provisions to private individuals, but it is not unfair to apply them to government that enacted them. Unlike *Landgraf*, petitioner/plaintiff in the instant case does not seek, nor is she authorized to seek, punitive damages. There is no "unfair surprise and upsetting expectations," *Landgraf* at 4266 n35, when the government applies new rules intended to "afford victims of discrimination more complete redress for violations of rules established more than a generation ago in the Civil Rights Act of 1964." *Landgraf* at 4266.

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[14]"Elementary considerations of fairness dictate. . ." at 4261; "potential for disruption or unfairness" at 4262; "burdening private rights" at 4263; "unfairness of imposing new burdens on persons after the fact" at 4263; "the government should accord grace to private parties disadvantaged by an old rule when it adopts a new and more generous one" at 4264 n30; "private parties could rely on §718 . . . unless doing so would result in manifest injustice" at 4265; "introduction of a right to compensatory damages is also the type of legal change that would have an impact on private parties' planning" at 4266; "Neither in *Bradley* itself, nor in any case before or since in which Congress had not clearly spoken, have we read a statute substantially increasing the monetary liability of a private party to apply to conduct occurring before the statute's enactment" at 4267.

CONCLUSION AS TO REASONS FOR GRANTING *CERTIORARI* ON THE QUESTION OF APPLICATION OF THE CIVIL RIGHTS ACT OF 1991 TO CASES FILED AFTER THE EFFECTIVE DATE.

The Court should grant *certiorari* because the Fourth Circuit's opinion conflicts with the decision of this Court in *Landgraf v. USI Film Products*, 114 S.Ct. 1483. The Fourth Circuit misapplied the ruling in *Landgraf* to this case, which was not pending on the effective date of the 1991 Act and the Fourt Circuit failed to apply the core reasoning of the Supreme Court in *Landgraf* in reaching a judgment in the case below. Without this Court's intervention and supervision, an important federal law will be misapplied in the Fourth Circuit causing an injustice.

CONCLUSIONS

For the reasons stated above, petitioner Virginia Ventre requests this Court to issue a writ of *certiorari* to review the decision of the Court of Appeals for the Fourth Circuit.

February 15, 1995

Respectfully submitted,

Louis Ventre, Jr.*
Attorney at Law
2483 Oakton Hills Drive
Oakton VA 22124-1530

**Counsel of Record*

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DECIDED: OCTOBER 28, 1994

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

L. VIRGINIA VENTRE,
Plaintiff-Appellant,

v.

ROGER W. JOHNSON,
Defendant-Appellee.

No. 93-2535

Appeal from the United States District Court
for the Eastern District of Virginia, at Alexandria.
Barry R. Poretz, Magistrate Judge.
(CA-93-609-A)

Argued: September 28, 1994

Decided: October 28, 1994

Before NIEMEYER and LUTTIG, Circuit Judges,
and PHILLIPS, Senior Circuit Judge.

Affirmed by unpublished per curiam opinion.

COUNSEL

ARGUED: Louis Ventre, Jr., Alexandria, Virginia, for Appellant. Rachel Celia Ballow, Assistant United States Attorney, Alexandria, Virginia, for Appellee. **ON BRIEF:** Helen F. Fahey, United States Attorney, Larry Lee Gregg, Assistant United States Attorney, Alexandria, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit. See I.O.P. 36.5 and 36.6.

OPINION

PER CURIAM:

Appellant Virginia Ventre filed this Title VII action in the United States District Court for the District of Columbia in March 1992, alleging that her supervisor at the General Services Administration, William Albee, had improperly denied her a promotion on account of her sex. In her complaint, Ventre requested, *inter alia*, compensatory damages and a jury trial, pursuant to § 102 of the Civil Rights Act of 1991 ("the Act"). The district court dismissed her claim for compensatory damages, and struck her demand for a jury trial, "because the acts complained of occurred before November 21, 1991," the effective date of the Civil Rights Act of 1991. J.A. at 125. The district court in the District of Columbia later granted the defendant's 28 U.S.C. § 1404 motion to transfer the case to the United States District Court for the Eastern District of Virginia. *Id.* at 154-56. A magistrate judge in the Eastern District subsequently dismissed the remainder of Ventre's action. *Id.* at 158.

Ventre raises two issues on appeal. She first challenges the transfer order entered by the federal district court in the District of Columbia. It is well-settled that we are without jurisdiction to review a transfer order entered by a district court in another circuit. *See, e.g., Brock* v. *Entre Computer Centers, Inc.*, 933 F.2d 1253, 1257 (4th Cir. 1991); *Linnell* v. *Sloan*, 636 F.2d 65, 67 (4th Cir. 1980); *Preston Corp.* v. *Raese*, 335 F.2d 827, 828 (4th Cir. 1964).

Ventre also contends that § 102 of the Civil Rights Act of 1991 applies to cases such as hers, which challenge conduct occurring before the effective date of the Act but were filed after the effective date. In *Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1508 (1994), the Supreme Court held that § 102 does not apply "to cases arising before its enactment." Ventre argues that *Landgraf* bars retroactive application of the Act only to those cases pending when the Act

became effective. We find no evidence that the Court's holding was so limited. Because § 102 does not apply retroactively, and the conduct giving rise to Ventre's complaint occurred before the effective date of the Act, the district court properly dismissed Ventre's requests for compensatory damages and a jury trial.

CONCLUSION

For the reasons stated herein, we affirm the judgment of the district court.

AFFIRMED

APPENDIX B

DENIAL OF PETITION FOR REHEARING
AND SUGGESTION FOR REHEARING IN BANC
BY THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

FILED: NOVEMBER 25, 1994

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

FILED
November 25, 1994

No. 93-2535
CA-93-609-A

L. VIRGINIA VENTRE

Plaintiff - Appellant

v.

ROGER W. JOHNSON

Defendant - Appellee

On Petition for Rehearing with
Suggestion for Rehearing In Banc

The appellants petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc ae denied.

For the Court,

/s/ Bert M. Montague
CLERK

United States District Court
Eastern District of Virginia

L. VIRGINIA VENTRE, (STAMP) FILED OCT. 6, 1993

Plaintiff, JUDGMENT IN A CIVIL CASE

V.

ROGER W. JOHNSON,

Defendant. CASE NUMBER: 93-0609-A

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

For the reasons stated from the bench and in accord with the finding of facts and conclusions of law stated therein, that Plaintiff take nothing, that the action be dismissed on the merits, and that the Defendant recover of the plaintiff, L. Virginia Ventre, his costs of action.

Date: October 6, 1993

/s/
BARRY R. PORETZ
United States
Magistrate Judge

/s/
(By) Deputy Clerk